Supreme Court, U.S.
FILED
NOV 30 1993
OFFICE OF THE CLERK

No. 93-730

In The
Supreme Court of the United States
October Term, 1993

IN RE PRISON INDUSTRY AUTHORITY, et al.,
Petitioners.

On Petition for Writ of Mandamus
to the United States District Court,
Eastern District of California

BRIEF IN OPPOSITION OF RESPONDENT GARY V. JERNIGAN

RICHARD W. NICHOLS, ESQ.
McDONOUGH, HOLLAND & ALLEN
A PROFESSIONAL CORPORATION
555 Capitol Mall, Suite 950
Sacramento, California 95814
Telephone: (916) 444-3900

Attorneys for Respondent
GARY V. JERNIGAN

BEST AVAILABLE COPY

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		ii
JURISDICTION		2
STATUTE INVOLVED		2
STATEMENT OF THE CASE		2
ARGUMENT		4
I.	THE COURT HAS NO JURISDICTION UNDER 28 U.S.C. § 1651(a)	4
II.	THE DISTRICT COURT'S ORDER IS CONSISTENT WITH THE APPLICABLE NINTH CIRCUIT STANDARD, WHICH REQUIRES A FACTUAL INQUIRY INTO THE "ECONOMIC REALITY" OF THE WORK RELATIONSHIP	5
III.	RELEVANT CALIFORNIA STATUTES RAISE FACTUAL QUESTIONS WHICH THE DISTRICT COURT HAS NOT HAD AN OPPORTUNITY TO ADDRESS	8
CONCLUSION		12

TABLE OF AUTHORITIES

Page

CASES

Carter v. Dutchess Community College, 735 F.2d 8 (1984) 6

Franks v. Oklahoma State Industries, 1993 U.S. App. LEXIS 26863 (October 18, 1993) 7

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 8

Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28, 33 (1961) 6

Hale v. State of Arizona, 993 F.2d 1387 (9th Cir. 1993) 4, 5

Harker v. State Use Industries, 990 F.2d 131 (4th Cir. 1993) 4, 7, 8, 11

Miller v. Dukakis, 961 F.2d 7 (1992) 7

Sims v. Parke Davis & Co., 334 F.Supp. 774 (E.D. Mich., 1971) 6

Sims v. Parke Davis & Company, 453 F.2d 1259 (1971) 6

Vanskike v. Peters, 974 F.2d 806 (1992) 7

Watson v. Graves, 909 F.2d 1549 (1990) 6

Wentworth v. Solem, 548 F.2d 773 (8th Cir. 1977) 7

TABLE OF AUTHORITIES (CONTINUED)

	Page
STATUTES	
28 U.S.C. § 1651(a)	2, 4
28 U.S.C. § 1292(b)	3
California Penal Code	
§ 2700	9
§ 2701	10
§ 2801	8
§ 2802	10
§ 2808	11
§ 2808(e)	10
§ 2811	11
§ 5001	9
§ 2803	10
Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq.	2, 5, 7, 11

No. 93-730

In The
Supreme Court of the United States
October Term, 1993

IN RE PRISON INDUSTRY AUTHORITY, et al.,
Petitioners.

On Petition for Writ of Mandamus
to the United States District Court,
Eastern District of California

BRIEF IN OPPOSITION OF RESPONDENT GARY V. JERNIGAN

Respondent Gary V. Jernigan, plaintiff in forma pauperis below, by and through his undersigned attorney, does herewith submit the following brief in opposition to petitioners' petition for writ of mandamus to the United States District Court for the Eastern District of California.

Respondent does not disagree with petitioners' Question Presented, petitioners' List of Parties, the presentation by

petitioners of appendices "A" and "B" as the relevant Opinions Below, ~~or~~ petitioners' Statement of Facts.

JURISDICTION

For the reasons set forth in Section I of his argument in opposition to petitioners' petition, respondent asserts that this Court does not have jurisdiction under 28 U.S.C. § 1651(a), and that no other basis for the discretionary exercise of this Court's jurisdiction exists.

STATUTE INVOLVED

Respondent agrees that the provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., cited by petitioners are relevant to this proceeding. Respondent asserts, however, that various statutes of the State of California are also relevant to this proceeding. See Section III of respondent's argument in opposition to petitioners' petition.

STATEMENT OF THE CASE

Respondent does not disagree with petitioners' Statement of the Case as set forth in their petition. Respondent also agrees

that the District Court filed an additional Order on November 3, 1993, denying petitioners' motion for certification pursuant to 28 U.S.C. § 1292(b). Respondent disagrees with petitioners' characterization (in their Supplemental Appendix) of that November 3 Order by the District Court as constituting a "modifi[cation of] its former position," and asserts that that Order is entirely consistent with the District Court's Order of August 27, 1993. The pertinent portions of the November 3 Order read as follows:

> "Defendants' [sic] argued in their motion to dismiss that the holding in Hale barred Plaintiffs' FLSA claim as a matter of law. Since the plain language of Hale provides otherwise, the Court declines to certify this issue. The Defendants' prior motion did not address the question the Jernigan Plaintiffs' [sic] propose for certification and therefore the Court did not consider it. Since the question has not yet been presented to the district court it is not appropriate for certification. [¶] The motion to dismiss was denied on the basis that Hale expressly did not hold that a prison/prisoner relationship cannot also be an employer/employee relationship, and Defendants failed to establish that the economic reality of Plaintiffs' labor belonged to the prison institution as was found in Hale. Hale, 993 F.2d at 1395."

ARGUMENT

I. THE COURT HAS NO JURISDICTION UNDER 28 U.S.C. § 1651(a).

Jurisdiction under the All Writs Act (28 U.S.C. § 1651(a)) is limited to those situations in which judicial writs may be issued by courts as "necessary or appropriate in aid of their respective jurisdictions." This Court does not presently have jurisdiction over any pending case which the instant petition would be "in aid of."

As indicated by petitioners themselves, in footnote 1, page 4 of their petition, this Court recently had two opportunities to address the questions which are inherent in the instant petition. It declined the opportunity to do so, by denying certiorari in Harker v. State Use Industries, 990 F.2d 131 (4th Cir. 1993), cert. den. No. 93-5298, October 4, 1993 ["Harker"], and in Hale v. State of Arizona, 993 F.2d 1387 (9th Cir. 1993), cert. den. No. 93-353, November 4, 1993 ["Hale"]. Respondent is not aware of any other prisoner FLSA case pending before the Court at this time.

II. THE DISTRICT COURT'S ORDER IS CONSISTENT WITH THE APPLICABLE NINTH CIRCUIT STANDARD, WHICH REQUIRES A FACTUAL INQUIRY INTO THE "ECONOMIC REALITY" OF THE WORK RELATIONSHIP.

There is, in essence, a two-fold split of authority in the circuits on the issue of FLSA treatment of prisoners. Some circuits, including the Ninth, determine whether an employer-employee relationship exists in a prison context by looking at the "economic reality" of the relationship between the parties. Hale, supra, 993 F.2d at 1394. The Ninth Circuit, in Hale, simply determined that the "economic reality" of a prison-prisoner relationship, under factual circumstances where the prisoner is obligated to work under a statute imposing a "hard labor" requirement as an incident of the prisoner's sentence, is such that the prisoner's work cannot be considered to be "voluntary," and therefore does not constitute "employment." The "economic reality" in such a situation is that the prison "owns" the prisoner's labor. Thus, a "hard labor" statute is merely an example of one particular type of "economic reality."

The "economic reality" test is a fact-intensive test, involving such inquiries as (a) the nature of the sentence imposed, (b) the location of the work performed, (c) the identity

of the entity for which the work is performed, (d) the voluntary or involuntary nature of the work assignment, and many other inquiries peculiar to the particular work program. It does not depend upon "technical concepts." Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28, 33 (1961).

The "economic reality" test applied in the Ninth Circuit is consistent with similar tests in other federal circuits which have spoken to the issue. Although application of the standard may vary on a factual basis peculiar to each particular situation, the standard itself is uniform. The "economic reality" test is expressly articulated as the applicable standard in the Second [Carter v. Dutchess Community College, 735 F.2d 8, 12 (1984)], Fifth [Watson v. Graves, 909 F.2d 1549, 1554 (1990)], and Sixth [Sims v. Parke Davis & Company, 453 F.2d 1259 (1971), adopting district court opinion, see Sims v. Parke Davis & Co., 334 F.Supp. 774, 787 (E.D. Mich., 1971)] Circuits, as well as in the Ninth Circuit.

In the instant case there has been absolutely no factual inquiry into the various matters which would be relevant to application of an "economic reality" test. Thus, if the "economic

reality" test is an appropriate standard, this case is not ripe for decision by any court, much less by this Court.

The opposing line of authority, articulated by the Fourth Circuit in Harker, supra, is to the effect that prisoners, as a class, are categorically excluded from coverage under the FLSA. Harker is a "bright line" case which expressly rejects the "economic reality" test. Harker, supra, 990 F.2d at 135.

In respondent's view Harker stands alone. There are cases from other circuits which articulate concepts generally consistent with Harker, but those decisions in fact go on to discuss the particular factual context of the individual claimants asserting FLSA entitlements, i.e., the "economic reality" in which those claimants find themselves. See, e.g., decisions of the First [Miller v. Dukakis, 961 F.2d 7 (1992) (work for the prison at the prison pursuant to state law establishing compensation system for both prison industry and general prison work), Seventh [Vanskike v. Peters, 974 F.2d 806 (1992) (performance of "forced labor" directly for the prison itself)] and Tenth [Franks v. Oklahoma State Industries, 1993 U.S. App. LEXIS 26863 (October 18, 1993) (work performed in prison) Circuits. Cf. Wentworth v. Solem, 548 F.2d 773

(8th Cir. 1977) (decided prior to Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)).

This Court recently had an opportunity to extend the Harker "bright line" throughout the country, but it declined to do so. The instant case, which involves significant issues of state law concerning the nature of California's particular prison industry program, is not an appropriate vehicle for deciding whether the "bright line" standard or the "economic reality" standard should be the applicable test.

III. RELEVANT CALIFORNIA STATUTES RAISE FACTUAL QUESTIONS WHICH THE DISTRICT COURT HAS NOT HAD AN OPPORTUNITY TO ADDRESS.

Various California statutes referenced below demonstrate the peculiar nature of this particular case. This is not a case involving general prison labor, and it is not a case involving mandatory work assignments by the Director of Corrections ("Director"). To the contrary, this case involves a program which has been carefully crafted by the California legislature (California Penal Code § 2801):

> "(a) To develop and operate industrial, agricultural, and service enterprises employing prisoners in institutions under the jurisdiction of the Department of Corrections, which enterprises

> may be located either within those institutions or elsewhere, all as may be determined by the [prison industry] authority.
>
> (b) To create and maintain working conditions within the enterprises as much like those which prevail in private industry as possible, to assure prisoners employed therein the opportunity to work productively, to earn funds, and to acquire or improve effective work habits and occupational skills.
>
> (c) To operate a work program for prisoners which will ultimately be self-supporting by generating sufficient funds from the sale of products and services to pay all the expenses of the program, and one which will provide goods and services which are or will be used by the Department of Corrections, thereby reducing the cost of its operation."

To be sure, the Prison Industry Authority is a part of the Department of Corrections ("Department"). The Prison Industry Authority ("Authority") and the Director are separate lines of authority within the Department. California Penal Code § 5001. General prison labor in California is required of prisoners by the Department, however, only in accordance with regulations of the Director (California Penal Code § 2700):

> "The Department of Corrections shall require of every able-bodied prisoner imprisoned in any state prison as many hours of faithful labor in each day and every day during his or her term of imprisonment as shall be prescribed by the rules and regulations of the Director of Corrections." (Emphasis supplied.)

California's prison industries program work assignments, however, are not under the control of the Director (California Penal Code § 2701):

> "The Department of Corrections is hereby authorized and empowered to cause the prisoners in the state prisons of this state to be employed in the rendering of such services as are now, or may hereafter be, needed by the state, or any political subdivision thereof, . . . except for services provided by enterprises under the jurisdiction of the Prison Industry Authority. The Department of Corrections may enter into contracts for the purposes of this article." (Emphasis supplied.)

While the Director may authorize a prisoner to apply to work in a prison industry program, it is the Authority itself which determines whether that prisoner will be accepted into the program. California's Prison Industry Authority is under the policy direction of a board of directors ("Board"), of which the Director is but one member out of eleven. California Penal Code § 2802. The Director is chairman and administrative head of the Board, California Penal Code § 2803, but the chief administrative officer of the Authority is a general manager appointed by the Board, California Penal Code § 2808(e). With specified exceptions, the Board is authorized to "have all the powers and do all the things which the board of directors of a

private corporation would do." California Penal Code § 2808. Among other things that includes the power

> "(h) To establish, expand, diminish, or discontinue industrial, agricultural and service enterprises under its jurisdiction to enable the authority to operate as a self-supporting organization, to provide as much employment for inmates as is feasible, and to provide diversified work activities to minimize the impact on existing private industry in the state."

Prisoner compensation rates for work under the prison industries program are set by the Board, not by the Director. California Penal Code § 2811.

All of the foregoing, and other statutory and regulatory provisions, are peculiar to California. There has been no factual inquiry concerning the implications of any of them. Accordingly, there has been no factual inquiry concerning the "economic reality" of California's program. Unless the Court is prepared to adopt the Harker "bright line" test excluding prisoners per se from FLSA coverage, this case simply is not ripe for consideration by this Court at this time. If the Court were prepared to do so, it could have granted certiorari in Harker for that purpose.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that petitioners' petition for writ of mandamus should be denied.

DATED: November 30, 1993

Respectfully submitted,

Richard W. Nichols

RICHARD W. NICHOLS, ESQ.
McDONOUGH, HOLLAND & ALLEN
A PROFESSIONAL CORPORATION
555 Capitol Mall, Suite 950
Sacramento, California 95814
Telephone: (916) 444-3900

Attorneys for Respondent
Gary V. Jernigan

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss
COUNTY OF SACRAMENTO)

Adele España-Purpur, being first duly sworn on oath deposes and states:

I am 18 years of age or older and not a party to the within entitled cause; my business address is 555 Capitol Mall, Suite 950, Sacramento, California 95814.

On November 30, 1993, I served the attached **BRIEF IN OPPOSITION OF RESPONDENT GARY V. JERNIGAN** in said cause, by placing three true copies thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
KENNETH C. YOUNG, Senior Assistant
Attorney General
JOAN W. CAVANAGH, Supervising
Deputy Attorney General
JAMES CHING, Supervising Deputy
Attorney General, Counsel of Record
1515 K Street, Suite 511
Sacramento, California 95814
Telephone: (916) 323-1948
Attorneys for Petitioners

Adele España Purpur
AFFIANT

Subscribed and sworn to before me
this 30th day of November, 1993.

Mary M. Amaral
Notary Public in and for said
County and State

PWR1 MARY M. AMARAL
Comm. # 993919
NOTARY PUBLIC - CALIFORNIA
Sacramento County
My Comm. Expires July 28, 1997 PWR1